BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEONARD M. LEHMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,038,672
PRECISION PUMP	)	
Respondent	)	
AND	)	
	)	
NETHERLANDS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 20, 2008, preliminary hearing Order of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded benefits in the form of outstanding medical expenses and ongoing pain management, with respondent ordered to provide a list of three physicians from which claimant was to choose a pain management physician. The ALJ determined that respondent had failed to prove an intoxication defense.

Claimant appeared by his attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Thomas J. Walsh of Roeland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Karl K. Rozman, Ph.D., taken September 29, 2008, with attachments; the deposition of Brian Brunelli taken October 1, 2008, with attachments; the transcript of Preliminary Hearing held October 2, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

Respondent raised the following issues in its Application For Appeals Board Review and Docketing Statement:

1. "Whether the claimant met with personal injury by accident.

2. "Whether the claimant [*sic*] alleged injury arose out of and in the course of her [*sic*] employment.

3. "Whether the claim should be denied pursuant to K.S.A. [2007 Supp.] 44-501(d)(2)."[1]

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed as respondent has proven that claimant's accident on January 15, 2008, and the resulting injuries were contributed to by claimant's consumption of drugs, both legal and illegal.

Claimant was a machine operator for respondent in its honing department on January 15, 2008. He daily worked with oil, grease and kerosene. On the date of accident, claimant had a short conversation with a co-worker, Jason Smith, a grinder for respondent, about the fact that claimant had oil on his shirt and pants. Mr. Smith testified that claimant was acting kind of strange, talking real loud, slurring his words and acting "like drunk, but not drunk".[2] After this brief conversation, claimant and Mr. Smith turned to return to their work areas. Out of the corner of his eye, Mr. Smith saw a gas torch which he used to heat glue being ignited by claimant. Within a few seconds, claimant's clothes were on fire and claimant suffered significant burns on his hands, arms, body, face and head. Mr. Smith stated that there was no reason for claimant to use the torch that day as the honing job did not require the use of a torch. Mr. Smith acknowledged that before the fire, he did not report claimant's strange actions to a supervisor.

The accident was reported to Randall Misenhelter, respondent's operations manager, who met claimant in the office, where claimant was soaking his hands in a bucket of water. As he approached claimant, claimant stated, "I don't want to lose my job,

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[1] Application For Appeals Board Review and Docketing Statement at 1.

[2] P.H. Trans. at 38.

I can't lose my job".[3] Claimant then acknowledged that he was using the torch to dry off his clothes. In his follow-up conversation with Mr. Smith, Mr. Smith stated that using a torch to dry off clothes was stupid. Mr. Misenhelter stated that no one had ever used a torch to dry off clothes, in his experience. He also noted that the torch in question burned at a temperature of approximately 1,900 degrees. This is hot enough to melt steel.[4]

Claimant was transported to the Allen County Hospital in Iola, Kansas, by Roland Weir, respondent's production manager and claimant's supervisor. During the trip to the hospital, claimant asked to be taken home and not to the hospital. Claimant admitted to being a "chronic pot smoker",[5] but did not admit to being high or impaired. Mr. Weir had heard claimant admit to Mr. Misenhelter that he was using the torch to dry his clothes. Mr. Weir agreed that no one had ever been reprimanded for using a torch to dry their clothes, but also said no one had ever used a torch to dry their clothes before.

Approximately 15 to 20 minutes before the accident, claimant had a conversation with Larry Nelson, Jr., respondent's plating supervisor. During this conversation, claimant's speech sounded "jarbled"[6] and was hard to understand. Claimant also said that it was time for him to take a pill. Claimant then took an unidentified little white pill. Mr. Nelson testified that he had never had trouble understanding claimant before. He also agreed that he would have notified a supervisor if he thought claimant was unsafe, and he did not notify a supervisor on that day. There was some indication in the record that claimant may have had a toothache on the date of accident, but Mr. Nelson was not aware of any toothache claim by claimant.

While claimant was being treated at the hospital, a drug screen was conducted and claimant was found to have 4,300 nanograms per milliliter (ng/ml) of opiates (morphine) which the parties acknowledge was administered as treatment for claimant's burns. Claimant also tested positive for marijuana metabolites (marijuana) at 49 ng/ml and benzodiazepines (Xanax) at 221 ng/ml. Claimant's personal physician, Dr. Richard Hall, had prescribed Xanax to be taken two milliliters, four times daily. The prescription also allowed claimant to take extra if necessary. Claimant testified that he would occasionally take an extra Xanax if necessary.[7] At the preliminary hearing, claimant acknowledged that he had smoked marijuana the night before the accident, at approximately 11:00 p.m. Claimant also testified to remembering nothing leading up to the accident, nor after the

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[3] P.H. Trans. at 51.

[4] P.H. Trans. at 56.

[5] P.H. Trans. at 62.

[6] P.H. Trans. at 32.

[7] P.H. Trans. at 25.

accident, except some vague memory of a co-worker with a fire extinguisher. Claimant testified that he had been on probation until either September or October 2007 and up to that time, he had been clean. After claimant was taken off probation, he began smoking marijuana every evening.[8]

Claimant's drug screen materials and information were transported to the Quest Diagnostics Laboratory (Quest) in Atlanta, Georgia. The laboratory director, Brian Brunelli, was deposed on October 1, 2008. During his deposition, Mr. Brunelli described the procedures followed by Quest in the testing of the drug screen materials. A detailed description of the laboratory procedures and the methods of protecting the chain of custody for the samples and the methods of verifying the drug samples with the appropriate patient was also provided. Mr. Brunelli testified to the levels of opiates (4,300 ng/ml), marijuana (49 ng/ml), and benzodiazepines (221 ng/ml), found in claimant's system. The Quest Diagnostics Laboratory is approved by the U.S. Department of Health and Human Services, and gas chromatography mass spectrometry procedures were used in the performance of the tests. At the preliminary hearing, claimant's counsel acknowledged that he was not challenging respondent's probable cause, nor the method of testing. The key dispute centers around the effect the marijuana had on claimant and whether respondent proved a contribution from the marijuana. Claimant also argued that the Xanax was a prescription drug and the record fails to prove that claimant exceeded the prescribed dosage.

Claimant's information and injury history were provided to Karl K. Rozman, Ph.D., a professor of pharmacology and toxicology at the University of Kansas Medical Center in Kansas City, Kansas. Dr. Rozman, a member of the American Board of Toxicology, studied claimant's file and the information from the drug screening performed at the Allen County Hospital and at the Quest Diagnostics Laboratory. It is noted that in Dr. Rozman's report on claimant, the nanograms listed for the Xanax showed 211 ng/ml. Additionally, during Dr. Rozman's deposition, Dr. Rozman and the attorneys regularly discussed both 211 and 221 ng/ml when discussing the Xanax. However, when subtracting 100 ng/ml from the laboratory results, Dr. Rozman found 121 ng/ml remaining, and the report from Quest[9] shows the 221 ng/ml level from the alprazolam metabolite (Xanax) test. Dr. Rozman found the results of the tests to indicate that claimant's levels of Xanax and marijuana were both very high. The marijuana level indicates a chronic marijuana smoker, which claimant admitted at the preliminary hearing. The Xanax level indicated claimant was using the drug at double the prescribed rate. Claimant had testified to using additional pills only occasionally. Dr. Rozman determined that claimant had either increased his daily dosage for several days leading up to the test, or claimant had taken as many as five extra pills that day. Dr. Rozman stated that testing in the range of 230 ng/ml could prove fatal

[8] P.H. Trans. at 24.

[9] Rozman Depo., Ex. 2.

for most people, and only claimant's chronic use allowed him to survive such high concentrations of the drug.

During extensive cross-examination, Dr. Rozman agreed that he was not able to verify when claimant had smoked marijuana or how much marijuana claimant had smoked. However, he testified that claimant was impaired from the level of drugs in his system, and the impairment contributed to claimant's accident. He also testified that the combination of marijuana and Xanax would have a cumulative effect, and would work together to create a combination effect due to their tendency to build up in the body's system. He reviewed past studies dealing with Xanax at high levels. In a test using 9 ml, the resulting level of ng/ml was 102. With this test, he was able to determine the level of pills needed by claimant to increase his test level to the 221 ng/ml. Thus, he opined that claimant either increased his pill level by several pills per day for several days, or took as many as five extra pills the morning of the accident. This level of drugs in claimant's system could result in motor skill problems, decision making problems, confusion, anterograde amnesia, increased reaction time, impairment of mental and psychomotor functions, and loss of memory.[10] He found it very significant that claimant had suffered amnesia for a period of time both before and after the accident. In discussing the half-life of marijuana and Xanax, Dr. Rozman determined that claimant's levels of the drug at the time he began working at 7:00 a.m. would have been higher than at the time of the tests, some 4 hours later. He stated that claimant was impaired and that levels of Xanax at 221 ng/ml would impair "anybody's cognitive capabilities".[11] Dr. Rozman was not aware of the specifics of the accident, but did vaguely remember that a torch and fire were involved.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[12]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[13]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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[10] Rozman Depo. at 12 and 48.

[11] Rozman Depo. at 73.

[12] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[13] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[14]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[15]

Respondent lists whether claimant suffered an accidental injury and whether that accident arose out of and in the course of claimant's employment as issues to be contested before the Board. However, the record clearly supports claimant's description of the accident and the incidents leading up to that accident. There is no information in this file to indicate that claimant suffered the burns anywhere but at respondent's factory while claimant was working for respondent. The key issue before the Board deals with claimant's drug use and the effect that use may have had on his mental faculties. Was claimant impaired and did that impairment contribute to the accident and resulting injuries?

K.S.A. 2007 Supp. 44-501(d) states in part:

> (2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months. It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the

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[14] K.S.A. 2007 Supp. 44-501(a).

[15] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite [1]	15

. . .

An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

(3) For purposes of satisfying the probable cause requirement of subsection (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances:

(A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;

(B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of confirmation, required by subsection (d)(2)(E) of this section, may have been at the employer's request;

(C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be

> evidence that the presumed impairment contributed to the accident as required by this section; or
>
> (D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly implemented at the time of testing.

Claimant argues that the Xanax use was within the prescribed dosages as claimant was to use two milligrams, four times daily, and additional pills if necessary. Claimant testified that he occasionally used extra pills, but had taken no extra pills on the date of accident. However, the levels of benzodiazepine were above the levels listed in K.S.A. 2007 Supp. 44-501(d). Additionally, Dr. Rozman testified that for claimant to have raised his benzodiazepine level to 221 ng/ml, claimant would have had to take extra pills daily for several days before the accident, or take as many as five extra pills on the date of accident. Claimant's testimony is not credible in light of the test results. It would be medically impossible for claimant's tests to register so high if claimant were using even close to the prescribed amount of Xanax.

The tests indicated that claimant's marijuana level was over three times the statutory level for impairment. Claimant argues that Dr. Rozman was unable to state that the use of marijuana contributed to the impairment. However, Dr. Rozman testified that chronic use of marijuana and Xanax would add to the impairment, increasing the effects of both drugs on claimant's system. Additionally, Dr. Rozman stated that the memory loss displayed by claimant was a clear sign that claimant was being adversely affected by the high concentrations of both Xanax and marijuana. Claimant testified to the chronic use of marijuana and that he had smoked it the night before the accident. Dr. Rozman stated that the effects of the drug would stay in claimant's system longer than the tetrahydrocannabinol (THC). He also stated that, unless claimant smoked marijuana at work, he would have had to have smoked one or several cigarettes either before he left for work or the evening before. This, coupled with claimant's admission that he smoked marijuana the night before and had been a chronic user for several months leading up to the accident, supports Dr. Rozman's opinion as to both impairment and causation.

Finally, this Board Member cannot fathom a person using a 1,900-degree torch to dry oil soaked clothes as a person acting in his or her right mind, while wearing those very clothes. K.S.A. 2007 Supp. 44-501(d) confirms that the levels of Xanax and marijuana found in claimant's body exceeded the dosages needed to establish a conclusive presumption of impairment. Additionally, the testimony of Dr. Rozman supports a finding that the high levels of both marijuana and Xanax in claimant's system contributed to the injury and disability from this accident. Pursuant to K.S.A. 2007 Supp. 44-501(d)(2), respondent is not liable under the Workers Compensation Act for the injuries and disability suffered by claimant from the accident on January 15, 2008. The Order of the ALJ is, therefore, reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered an accidental injury on January 15, 2008, which arose out of and in the course of his employment with respondent, but respondent is not liable for the resulting injury or disability as claimant's use of both Xanax and marijuana resulted in a conclusive presumption that claimant was impaired at the time of the accident, and that impairment contributed to the injury and disability from that accident. Respondent is not liable for the resulting injury or disability from that accident, pursuant to K.S.A. 2007 Supp. 44-501(d)(2).

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated October 20, 2008, should be, and is hereby, reversed and respondent is not liable for the injury or disability resulting from the accident of January 15, 2008.

IT IS SO ORDERED.

Dated this ____ day of February, 2009.

HONORABLE GARY M. KORTE

c: R. Todd King, Attorney for Claimant
Thomas J. Walsh, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[16] K.S.A. 44-534a.